Supreme Court, U.S.
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No. 83-341

In the Supreme Court of the United States

October Term, 1983

PETER PEARSON,
Appellant,
vs.
STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT MAY CONSIDER HEARSAY, AS WELL AS DIRECT EVIDENCE AT A HEARING ON A MOTION TO SUPPRESS EVIDENCE IN A CRIMINAL CASE.

2. WHETHER THIS COURT SHOULD CONSIDER APPELLANT'S ARGUMENT ALLEGING DENIAL OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN APPELLANT NEVER RAISED THE ISSUE AT THE MOTION TO SUPPRESS AND NEVER SUBPOENAED THE LAW ENFORCEMENT OFFICER AS HIS WITNESS.

3. WHETHER THIS COURT WILL REVIEW THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A FINDING OF GUILTY ON A NO CONTEST PLEA TO CARRYING A CONCEALED WEAPON WHERE THE UNCONTESTED EVIDENCE DEMONSTRATES THAT THE WEAPON WAS RETRIEVED FROM UNDERNEATH APPELLANT'S CLOTHING.

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case. Furthermore, the federal questions sought to be reviewed were not timely or properly raised.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the conviction. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court.

No substantial federal question is presented by this appeal.

HISTORY OF THE CASE

Appellant was indicted for carrying a concealed weapon. Appellant's counsel filed a motion to suppress the weapon seized by the police following a search of his person. The trial court overruled the motion to suppress.

Thereafter, Appellant pled no contest, and was found guilty by the trial court. Three months after the plea of no contest, the trial court released Appellant on "shock probation" pursuant to Ohio Revised Code, Section 2947.061.

Appellant's appeal to the Ohio Court of Appeals, Eighth Judicial District, resulted in his conviction being affirmed.

The Ohio Supreme Court declined jurisdiction finding no substantial constitutional question presented for review.

STATEMENT OF THE CASE

At the suppression hearing, Cleveland Police Officer, Theodore Taylor, stated that at about 9:30 p.m. on the evening of January 28, 1981, he and his partner, Harlin Whorthington, heard three shots as they were leaving an assignment at East 134th Street and South Woodland (R. 4-5). They drove west on South Woodland to look for the source of the shots (R. 5). As they approached an intersection where three men were standing, Taylor testified that the appellant was pulling on his coat. Taylor also testified, over the objection of defense counsel, that his partner, Whorthington, hollered, "Stop," and said that one of the men had a gun (R. 507). Whorthington told the men to "freeze," and patted down the appellant while Taylor held his gun on the three men (R. 8). Whorthington removed a loaded nine caliber automatic revolver and 62 live rounds of ammunition from underneath the appellant's jacket (R. 8-10).

Officer Taylor personally observed his partner remove the weapon and ammunition from Appellant (R. 8-10).

Subsequently, Appellant pled no contest and was found guilty of carrying a concealed weapon.

MOTION TO DISMISS OR AFFIRM

1. **THE TRIAL COURT CAN CONSIDER HEARSAY, AS WELL AS, DIRECT EVIDENCE AT A SUPPRESSION HEARING.**

2. **FAILURE OF APPELLANT TO RAISE AN ISSUE RELATING TO A DENIAL OF CONFRONTATION CONSTITUTES A WAIVER, AND THUS, CANNOT BE RAISED IN LATER APPELLATE PROCEEDINGS.**

Appellant argues that hearsay evidence may not be considered at a suppression hearing. That issue has been decided by this Court in *United States v. Matlock,* 415 U.S. 164 (1974). Appellant fails to recognize that hearsay evidence was not the only evidence presented at the suppression hearing. Direct evidence was offered by the prosecution when Officer Taylor personally observed his partner remove a weapon and ammunition from the appellant (R. 8-10). Thus, the trial court had ample evidence upon which to overrule the appellant's motion to suppress.

Appellant also argues that he was denied the opportunity to cross-examine Officer Whorthington who was not present at the suppression hearing. Appellant waived this so-called argument of confrontation when appellant did not raise this issue in the trial court. See, *State v. Williams,* 51 Ohio St. 2d 112 (1977); and *Toledo v. Reasonover,* 5 Ohio St. 2d 22 (1965). See also, *Wainwright v. Sykes,* 433 U.S. 72 (1977).

Moreover, the appellant at the suppression hearing, never subpoenaed Officer Whorthington as a witness despite possessing the right to do so.

3. THIS COURT WILL NOT REVIEW THE SUFFICIENCY OF THE EVIDENCE PRESENTED IN THIS CASE.

At a suppression hearing the prosecution has no greater burden of proof than proof by a preponderance of the evidence. *United States v. Matlock, supra.*

According to the testimony of Officer Taylor, the weapon and ammunition were retrieved from underneath the appellant's clothing. Thus concealment was amply demonstrated.

In the present case, the search and subsequent arrest of the appellant were lawful. Patrolman Taylor was using good police work in this case. He had a reasonable suspicion that someone had a gun in the area. He had heard three gunshots and since he was in his police cruiser, responded to the area within moments. Ptl. Taylor also stated that of the only three males he saw in the area, the appellant, Peter Pearson, was making an unusual movement by pulling on his jacket. Even without the statement of Ptl. Worthington that he thought one of the males had a gun partially visible, Ptl. Taylor had enough "articulable facts" which would lead to "rational inference" that he should investigate the defendant. Thus, there were adequate grounds to search the appellant. Prior to the search, Officer Taylor had not seen any gun on the appellant. It was the lawful search of the appellant which revealed the weapon, and gave rise to the grounds for the arrest for carrying a concealed weapon. The testimony was *uncontroverted* that the gun was *underneath* the coat of the appellant, Peter Pearson, at the time of the search. No evidence was presented to show that the gun was found anywhere else. At the time of the stop and frisk, the gun was concealed *underneath* the coat of Peter Pearson.

The question of concealment is a question of fact, a jury question. The appellant pled no contest and was found guilty.

Under Ohio Rules of Criminal Procedure 11(b)(2), "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment. . ."

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or in the alternative, to affirm the judgment entered in the cause by the Ohio Supreme Court.

Respectfully submitted,

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